THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

BACON'S MAXIM 25.— (*From Professor Thayer's Lectures.*) — Those do wisely, such as Wigram and Stephen and Nichols (in his excellent article in the Juridical Society Papers, ii. 351), who, in dealing with the parol-evidence rule, reject the use of Lord Bacon's maxim and commentary upon ambiguity. It does not help: it confuses. It is inextricably connected with a hopeless mass of mere jargon in our later books; and it cannot be understood by the mere reading of it,— you must turn on the light of a knowledge of the legal conceptions which were peculiar to the time, and of their fanciful and pedantic style of expression. And yet anything which has figured as this thing has and still does in the phraseology of one subject must be understood.

Bacon's conception appears to be this: —

1. When an ambiguity, *i.e.*, a doubtful meaning, appears on the mere face of the document, you cannot cure it by extrinsic matter, because this would be a mingling of a matter of specialty with matter of fact, *i.e.*, extrinsic matter of the "inferior" grade. [He then illustrates by cases where the attempt is to show the intention, pure and simple, of the maker of a specialty. His conception is of an attempt to remove the doubt by *giving effect and operation* to an unexpressed intention; he is not thinking of a merely evidential use of such an intention, like that which Wigram refers to, in his paragraph 79.] But, he goes on, it may be cured sometimes by construction [*i.e.*, by a comparison of all parts of the paper together, where, indeed, as we observe, the curing of the doubt comes from ascertaining that, all things being considered, there is none] or by election [*i.e.*, in virtue of the doctrine that a certain party has his choice of several possible meanings.]

2. A latent ambiguity, *i.e.*, one which does not present itself upon the face of the paper, upon the bare reading of it, but is revealed by extrinsic matter — may be cured by extrinsic matter; for, in doing this there is no mingling of the incongruous things matter of specialty and matter of fact, but the mere meeting of one matter of fact by another. Yet two things, he goes on, are to be observed; viz., (*a*) the doctrine of election applies equally whether the ground for it appears on the face of the paper, or only be revealed by extrinsic matter; and (*b*) the mere intention of the writer, although, indeed, it be extrinsic matter, "matter in fact," cannot be used to cure a latent ambiguity, unless it be one of equivocation; for in that case only is there an expression in the writing of this intention,— an expression which, while it fits several things, does exactly fit and utter this intended thing.

In order to understand all this, we have to remember that Bacon is not talking or thinking about "evidence," in our sense of the word. He is expressing a doctrine about *giving effect and operation* to intention as discriminated from the writing itself. This cannot be done, he says, when it is unexpressed: it can be done when it is adequately

expressed, and at the same time expressed in an equivocal form, and only then. This conception, as I said before, is not that of using it evidentially,— all that sort of thing is more modern; it is the conception of letting the mere thought and purpose of the writer have an operation, by their own force, to cure and put life into an uncertain document, a thing never to be done, he means, when the uncertainty is in the very texture of the document itself; only to be done when the ambiguity is latent, and even then, only when it has the character of equivocation.

Two more things should be noticed: (1) What Bacon means by averment, an expression which generally and properly relates to pleading, may be seen by turning to the second paragraph of his Maxim 6, and recalling the ancient doctrine which survives and is familiar to us to-day, that a sheriff's return of having served a writ is conclusive. Bacon says: "As if the Sheriffe make a false returne that I am summoned, whereby I lose my land; yet because of the inconvenience of drawing all things to incertainty and delay, if the Sheriffe's returne should not bee credited, I am excluded of my averment against it, and am put to mine action of deceit against the Sheriffe and Summoners." The conception is not that of excluding a certain sort of evidence, but of excluding a certain ground of defence. (2) The second thing is an emphatic repetition and reminder that Bacon's maxim cannot be read alone; it must be illustrated by his commentary. For near the end of his preface to the "Maxims"—that admirable bit of discourse which begins with the famous remark, "I hold every man a debtor to his profession," etc. — Bacon has warned all who resort to his maxims in the clearest manner against this common and almost universal error in the use of them: "Lastly," he says, "there is one point above all the rest I accompt the most materiale for making these reasons indeed profitable and instructing, which is, that they be not set downe alone, like short darke Oracles, which every man will be content still to allow to bee true, but in the meane time they give little light or direction; but I have attended them (a matter not practised, no not in the civill law to any purpose; and for want whereof indeed the rules are but as proverbs, and many times plaine fallacies) with a cleere and perspicuous exposition, breaking them into cases, and opening them with distinctions, and sometimes shewing the reasons above whereupon they depend, and the affinity they have with other rules."

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ADMIRALTY — JURISDICTION — COLLISION — RAFTS. — Rev. Sts. U. S. § 3, defines "vessel" as including every "description of water-craft, or other artificial contrivance used, or capable of being used, as a means of transportation by water." *Held*, that a raft made of cross-ties, used as a convenient mode of bringing them to market, manned by a pilot and crew, who lived and had shelter thereon during a voyage of many days, propelled by the tides and by poles and large oars, was a vessel, so as to give jurisdiction to admiralty of a libel *in rem* against it for a collision on navigable waters. *Seabrook* v. *Raft of Railroad Cross-ties*, 40 Fed. Rep. 596 (S. C.).